Supreme Court, U.S.
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No. 93-1411

In the Supreme Court of the United States

OCTOBER TERM, 1993

PUPI WHITE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly dismissed a petition for review of a final order of deportation issued by the Board of Immigration Appeals, in a case in which the petition was filed more than 90 days after the Board's order and while a motion to reopen or reconsider that order was pending before the Board.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32-60) is reported at 6 F.3d 1312. The decision of the Board of Immigration Appeals (Pet. App. 61-68) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1993. A petition for rehearing was denied on December 9, 1993. Pet. App. 71. The petition for a writ of certiorari was filed on March 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a citizen of Western Samoa who entered the United States in 1979 on a three-month tourist visa. In 1985, he was convicted under 18 U.S.C. 911 of falsely stating on a passport application that he was a United States citizen. See Pet. App. 33-34, 64-65.

2. The government instituted deportation proceedings based on petitioner's failure to comply with the terms of his visa. In March 1985, the immigration judge found petitioner deportable and denied his request for voluntary departure under 8 U.S.C. 1254(e). See Pet. App. 34.

3. The Board of Immigration Appeals dismissed petitioner's appeal on June 3, 1992. Pet. App. 61-68. The Board rejected petitioner's claim that the immigration judge was biased, which rested on the demeanor of the immigration judge at petitioner's deportation hearing. *Id.* at 63-64. The Board also concluded that petitioner was statutorily ineligible for voluntary departure, because his 1985 conviction prevented him from establishing the good moral character that is a requisite for voluntary departure. *Id.* at 64-65 (citing 8 U.S.C. 1101(f)(3), 1254(e)).

On July 6, 1992, petitioner filed a motion requesting that the Board reopen and reconsider its decision. On September 2, 1992 (91 days after the Board's decision), petitioner filed a petition for review in the court of appeals. See Pet. App. 35.

4. The court of appeals dismissed the petition for review. Pet. App. 32-60.

a. The court of appeals at oral argument raised the question whether petitioner's filing of a motion to

reopen or reconsider rendered the decision of the Board nonfinal, and thus tolled the time for filing a petition for review of that decision. The court of appeals analyzed that question in detail, noting the differing views of the various courts of appeals on the question, and concluded that petitioner's filing of a motion to reopen or reconsider did not affect the finality of the Board's decision. Pet. App. 36-55.

b. Having determined that the period for filing a petition for review commenced with the issuance of the Board's June 3, 1992, order, the court then considered whether petitioner's September 2, 1992, petition for review was timely. Pet. App. 55-60. Because the petition for review was filed 91 days after the Board's order, the court held that it was untimely, explaining that "[t]his is not a situation in which we have discretion to waive the filing requirement. The timeliness requirement set forth in [8 U.S.C. 1105a (Supp. IV 1992)] is mandatory and jurisdictional." Pet. App. 56-57 (internal quotation marks omitted). The court also noted that Fed. R. App. P. 26(b) states that the court may not "enlarge the time prescribed by law for filing a petition to * * * review * * * an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law." Accordingly, the court dismissed the petition for review for lack of jurisdiction. Pet. App. 57-60.

ARGUMENT

Petitioner does not challenge the court of appeals' conclusion that it could not accept a petition for review filed outside the 90-day filing period prescribed

by 8 U.S.C. 1105a(a)(1) (Supp. IV 1992).[1] Rather, petitioner's sole argument (Pet. 12-31) is that the court of appeals erred in concluding that the time for filing a petition for review was not tolled by his filing of a motion to reopen or reconsider the Board's order. As we have explained in our brief responding to the petition in *Stone* v. *INS*, No. 93-1199 (a copy of which we have provided to counsel for petitioner), that is an important question, on which the courts of appeals are divided. Petitioner fails, however, to indicate how resolution of that question in accordance with petitioner's views would affect the court of appeals' disposition of this case.

If, as petitioner argues, his filing of a motion to reopen or reconsider the Board's order deprived that order of finality, then the motion also deprived petitioner of the ability to seek review of the order, because the jurisdiction of the court of appeals under 8 U.S.C. 1105a(a) (1988 & Supp. IV 1992) is limited to "final orders of deportation." Accordingly, courts that have accepted petitioner's view of the finality question regularly have dismissed petitions for review that—like this one—were filed while a timely motion to reopen or reconsider was pending before the Board. See, *e.g.*, *Ogio* v. *INS*, 2 F.3d 959, 960 (9th Cir.

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[1] The 90-day period prescribed by 8 U.S.C. 1105a(a)(1) (Supp. IV 1992) applies to this case, rather than the six-month period available under prior law, see 8 U.S.C. 1105a(a)(1) (1988). The period was shortened by Section 545(b) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5065, and applies to final orders of deportation entered on or after January 1, 1991. 1990 Act § 545(g)(4), 104 Stat. 5067. Section 545(g) of the 1990 Act is set out as a note following 8 U.S.C. 1252b (Supp. IV 1992).

1993); *Chu* v. *INS*, 875 F.2d 777, 779-780 (9th Cir. 1989); *Fayazi-Azad* v. *INS*, 792 F.2d 873, 874 (9th Cir. 1986). Petitioner offers no reason for supposing that his case would be disposed of any differently.

In sum, however the question at issue in *Stone* is resolved, petitioner's petition for review would not fall within the jurisdiction conferred by 8 U.S.C. 1105a(a) (Supp. IV 1992). If a motion to reopen or reconsider does not affect the finality of a final order of deportation, the petition for review was untimely because it was filed more than 90 days after the final order of deporation was issued by the Board. If a motion to reopen or reconsider deprives a final order of deportation of finality for purposes of 8 U.S.C. 1105a(a) (1988 & Supp. IV 1992), then petitioner's petition for review was premature because no final order has yet been issued.[2]

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[2] It may be that the decision in *Stone* would have an effect on the disposition of a timely petition for review filed after the Board decides petitioner's motion to reopen or reconsider, because a decision in *Stone* indicating that petitioner's petition here should have been dismissed as premature would suggest that petitioner could challenge the underlying order in any subsequent, timely filed petition. But the possibility that *Stone* might have an effect on future litigation involving petitioner is not a reason to hold the petition in this case until the Court disposes of *Stone*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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